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No. 360

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

and

FLOYD N. LEMMONS,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

*Appellees.*

**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.**

## REPLY TO MOTIONS TO AFFIRM.

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# REPLY TO MOTIONS TO AFFIRM.

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### The Motions Themselves Demonstrate That the Issues Require Plenary Consideration.

Even the most casual reading of the respective motions of the Government and the appellee railroads leads to the conclusion that resolution of the issues raised by this appeal require plenary consideration by this Court. Government counsel, apparently of the view that the paucity,

generality and vagueness of the Commission's findings do not afford a substantial basis for defense of the Commission's order, have undertaken to attribute to the Commission's report findings which it did not make, and to attempt to particularize and apply to the proposed joint motor-rail rate those general findings of the Commission as to what other railroads *might* do, or what other railroads fear *might* happen, in *their* transportation of coal from the involved area.

Government counsel also failed to discuss several of the issues, including the contention of appellants that the concerted refusal of appellee railroads to enter into joint arrangements with motor carriers, to which the Commission did not refer in its report, constitutes a destructive competitive practice which the Commission's order would perpetuate.

Appellee railroads made little reference to the Commission's findings. Rather, they largely referred to the scanty evidence they introduced in the Commission's proceeding relating to the rate structure, and to the findings and conclusions proposed by counsel for the Commission and adopted by the district court. The court's findings and conclusions cannot, of course, be resorted to for the purpose of supplying deficiencies in the Commission's report. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific RR. Co.*, 294 U.S. 499.

**The Alleged Detrimental Effect on the Rate Structure.**

The Commission's order is predicated on its finding that "if the railroads were forced by competition to enter into joint motor-rail rates . . . with reductions in their revenues . . . the results could be unnecessary dissipation of

carrier revenues and serious disturbance of a just and reasonable rate adjustment, in contravention of the National Transportation Policy" (J.S. 16a, 17a). The statement as to disturbance of the rate adjustment is a complete *non sequitur*, and contradicts the Commission's subordinate finding that the service under joint motor-rail rates would be performed "at the same group rates" (J.S. 16a).

The Commission's report deals, not with possible *rate* reductions, but with possible reductions in railroad *revenues* that it apparently believes might result from possible motor carrier participation in the transportation. Yet Government counsel, starting with alleged discrimination by the C&EI against a (non-existent) shipper at Haubstadt, fancifully trace an anticipated "downward spiral" in rates, terminating in "an unreasonably low level of rates", all of which they assert the Commission found in its report (motion, pages 3 and 4). Nowhere are there any such findings in the Commission's report, and, contrary to the assertions of the Government, at no place in the findings and conclusions made by the district court is there any reference to any such findings.

The anticipated "downward spiral" in rates would be precipitated, according to Government counsel, (and they boldly assert that the Commission so found), by a required reduction in the C&IE's all-rail rate from Haubstadt, to avoid discrimination against Haubstadt shippers (motion, page 3). But the Commission could not possibly have made this finding, for the simple reason that there is no coal mine at Haubstadt. Even if there were a coal mine located there, neither Section 2 nor Section 3(1) of the Interstate Commerce Act would require that the all-rail rate from Haubstadt be on the same level as the

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C&EI's division of the proposed rate, because under an all-rail rate from Haubstadt the C&EI would be performing extensive mine and train switching services there and supplying cars partly on a rent-free basis, costly services which the C&EI would not perform under the proposed rate from Lynnville. *Cf. State of New York* v. *United States*, 331 U.S. 284, 305.

What the Commission actually found regarding possible discrimination was that *if the fears* of appellee railroads that approval of the proposed rate were to force "midwestern railroads generally to reach out by similar arrangements to mines served by competing railroads" were to materialize, "to avoid unlawful discrimination, like arrangements would probably be required also from numerous off-rail mines" (J.S. 16a). The finding ignores the rule that discrimination can be practiced only by a carrier serving, in single-line or joint-line service, the point allegedly favored and the point allegedly prejudiced.[1] And the Commission cannot compel joint motor-rail rates (Gov't. motion, P. 6; 75th Annual Rpt. of the Commission, P. 186). Also, the Commission, in approving *proposed* rates, has held that it "cannot conclude, from an allegation of those who are neither shippers nor receivers, that undue prejudice exists merely because a service provided at one point is not extended to other points" served by the same carrier. *Motor-Rail-Motor Traffic in East and Midwest*, 219 ICC 245, 269. This principle has even stronger application to the instant case, since the "midwestern railroads generally" have not proposed any joint motor-rail rates on coal, and the prospects that they will do so are built on highly speculative hypothesis.

The doctrine enunciated by the Commission in *Motor-Rail-Motor Traffic*, above, is in accord with the teaching

[1] Cf. New York Central RR. Co. v. United States, 207 F. Supp. 483, 489 (S.D.N.Y., 1962).

of this Court that "because opportunities for the violation of the Act may occur by reason of the [rate, rule, practice] is no ground for holding that . . . the [rate, rule, practice] is illegal". *Southern Pacific Company* v. *Interstate Commerce Commission*, 200 U.S. 536.

*Ayrshire Collieries Corporation* v. *United States*, 335 U.S. 573, relied on by appellees, clearly is inapplicable, since it involved discrimination as between shippers and receivers of coal caused by the fact that proponents' single-line rates were lower than the joint-line rates in which proponents participated. But here the proposed rate is identical to the all-rail rate and for the same services, and therefore cannot discriminate against any shipper or receiver, *nor did the Commission find that it would.* The only statement in the Commission's report as to a possible rate reduction is a reference to a possible reduction in the New York Central's rate from Lynnville (J.S. 16a). But even if this possibility were to become a reality, it would not necessarily disrupt the rate structure. As this Court said in setting aside a rate order of the Commission in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 294 U.S. 499, 507:

> "Every change of a rate schedule, either voluntary or involuntary, is a disruption *pro tanto* of the rate structure theretofore prevailing. Plainly such a disruption without more is not sufficient reason for prohibiting a change . . ."

Such reduction would be "subject to the power of the Commission, which may keep the changes within bounds". *Chicago, Milwaukee case, supra* (294 U.S. 499, 509).

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[2] For a recent application of the Chicago, Milwaukee doctrine to the Commission's "fear about a rate war", see New York Central RR Co. v. United States, 207 F. Supp. 483, 497 (S.D.N.Y., 1962).

**The "Additional Services" Allegedly Rendered under the Proposed Joint Motor-Rail Rate.**

Contrary to the Government's statement (pages 2 and 3), the Commission did not find that the *proposed rate* would relieve shippers of trucking and transfer burdens and shift them to appellant railroad, or that the *proposed rate* would entail additional services at the same group rates. The Commission merely made the general finding that the cross-haul of coal by motor carriers to facilities of "competing" rail lines would entail additional services at the same group rates (J.S. 16a); there is absolutely no finding that there will be any cross-hauling under the proposed rate. The Commission could not have made this latter finding, because the motor-rail route is 22.7 miles shorter than the all-rail route of the New York Central and 25.5 miles shorter than the all-rail route of the Southern Railroad—Chicago & Eastern Illinois Railroad. (Reply to Protest, not denied or rebutted by Protestants).

As for the allegation by Government counsel that the loading or transfer burden will be shifted from the mine operator to appellant C&EI, the Commission made no such finding. The mine operator at Lynnville will continue to load the coal, and he will pay the equivalent of the all-rail rate for the transportation to Chicago, which includes the haul by motor carrier from Lynnville to Haubstadt. Therefore, even if the mine operator at Lynnville were not located on a line of railroad and had been trucking his coal to Haubstadt, he would, under the proposed rate, merely be substituting regulated motor carriage for private motor carriage.

The line-haul service that would be performed by appellant Lemmons between Lynnville and Haubstadt would replace the line-haul service presently performed by the Southern Railroad between Lynnville and Evansville. If

any additional service were required there would be an additional charge therefor (Tr. 101, 102). The services to be performed under the proposed rate are indistinguishable in principle from trailer-on-flat-car services in which motor common carriers perform all services to and from the railheads. Many such joint arrangements have been approved by the Commission.

In fact, the services performed under the joint motor-rail rate would be much less extensive than those performed under the all-rail rate, as indicated by the increasing popularity of trailer-on-flat car service, so ardently espoused by the railroad industry. That the all-rail services are much more costly is attested by the fact that such service requires extensive switching and prolonged rent-free detention of coal cars at the mine, costly services which would not be performed under the motor-rail rate.

Moreover, regarding the "additional services" that allegedly would be rendered by other railroads to off-rail mines, there is no evidence in the record that there are any off-rail mines in Indiana.

**The Proposed Service Will Not Result in Cross-Hauling and the Rendition of Additional Services by Other Railroads.**

The uncontroverted evidence of record is to the effect that the only motor common carrier with operating rights from any mine in the involved area is applicant Lemmons, whose authority is restricted to a radius of forty-five miles from Booneville, Indiana. Therefore, the *fears* of the appellant railroads, as expressed in the Commission's report (J.S. 16a), that approval of the proposed rate would "force midwestern railroads generally to reach out by similar arrangements to mines served by competing railroads" (J.S. 16a) have little basis in reality and are a completely nebulous predicate for the Commission's order.

**The Alleged Reduction in Rail Revenues.**

Evidence as to only two all-rail routes was introduced in the proceeding, namely, the New York Central route and the Southern-C&EI route. That evidence encompassed the circuity of the all-rail routes; the practice of "no billing" (prolonged rent-free detention of cars at the mine); costly switching operations at the mine; in the case of the Southern-C&EI route, interchange at Evansville; and in the case of the New York Central route, at least four intermediate switching services enroute to Chicago (Reply to protest, and again in petition for reconsideration, not denied or rebutted). The foregoing evidence was ignored by the Commission in its finding relating to possible diminution of "revenues of railroads generally." For all that appears of record, joint motor-rail rates on coal would enhance *net* rail revenues.

**The Proposed Rate Will Not Result in Diversion of Coal Traffic from Other Railroads.**

Appellant Lemmons presently transports coal from the mine at Lynnville to Evansville (J.S. 14; Tr. 93). Operation under the proposed rate would require maximum utilization of the truck loading facility at the Lynnville mine and of Lemmons' equipment (J.S. 14a). Therefore, he would merely be substituting an operation to Haubstadt for his present operation to Evansville.

Since Lemmons is the only motor carrier serving Lynnville, it is reasonable to expect that the coal which he presently hauls to Evansville will move to Evansville over the rails of the Southern Railroad or the New York Central. There could therefore not possibly be any diversion of coal tonnage from the rails. The only controversy therefore is which railroad or railroads will move the

traffic, and this, it is submitted, is the basis of the New York Central's complaint.

**Appellant Railroad Would Benefit from Approval of the Proposed Rate.**

Contrary to the implication made by appellee railroads (motion, page 9), appellant C&EI would benefit from approval of the proposed rate. The C&EI would receive $2.32 per ton as its division of revenues under the proposed rate, whereas its present division of revenues under the Southern-C&EI joint rate is $1.89 per ton for a 17.5 mile longer haul. (Reply to Protest, not denied or rebutted). The C&EI would also be relieved of the burden of costly switching services at its junction with the Southern at Evansville. (*Idem.*) Appellee railroads can find little solace in the three cases[3] cited for the proposition that the Commission has protected all parties in acting to preserve the said rate structure (motion, page 9). In each of the cited cases the Commission issued an order which it felt was designed to preserve a rate structure and in each case the Commission's order was set aside, in rather forceful language, by a three-judge Court.

**The Concerted Refusal of Appellee Railroads to Enter into Joint Competitive Rates with Motor Carriers Is a Destructive Competitive Practice, Which the Commission Should Have Considered.**

The Commission made no reference in its report to the testimony of a railroad witness that railroads in Central

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[3] **New York, New Haven & Hartford Railroad Company v. United States,** 199 F. Supp. 635 (D. Conn., 1961); **Missouri Pacific Railroad Company v. United States,** 203 F. Supp. 629 (E.D. Mo., E.D. 196_ ; **St. Louis-San Francisco Railroad Company v. United States,** ..... F. Supp. ..... (Civil No. 61 C 309 (1) E.D. Mo 1962, not printed).

Territory "very frequently in the recent past" have discussed the "feasibility" of entering into joint rates on coal with motor carriers, and had decided against doing so, in order to protect their revenues (Tr. 45). Yet the Commission's order would perpetuate the effects of this concerted action.

Contrary to the contention of appellee railroads, the Interstate Commerce Commission is a proper forum in which to allege this violation of the antitrust laws (Sherman Act, 15 U.S.C. §1). *New York Central Railroad Company* v. *United States, et al.*, 194 F. Supp. 947 (S.D.N.Y., 1961), motion to affirm granted, *New York Central Railroad Company* v. *United States, et al*, 368 U.S. 349. The three-judge district court in the *New York Central* case, in construing the "destructive competitive practices" provision of the National Transportation Policy, referred to earlier enactments of antitrust legislation for "an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission . . . to decline to countenance" (194 F. Supp. at 951). Cf. *McLean Trucking Company* v. *United States*, 321 U.S. 67, 86-87, and *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481.

None of the antitrust statutes referred to by the district court in the *New York Central* case prohibits any type of practice similar to the promulgation of a joint motor-rail rate identical to the all-rail rate. On the other hand, the railroads' boycott of motor carriers is a *per se* violation of the antitrust laws, not requiring proof of public injury. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207.

The Commission, in its report in the instant case, has ignored the teaching of *McLean Trucking Company* v.

*United States*, 321 U.S. 67, 86-87, that the Commission should not "ignore" the policy underlying the anti-trust laws, since "[t]he preservation of independent and competing * * * carriers unquestionably has bearing on the achievement of those ends" of the national transportation policy.

The Government is silent on this point, and understandably so, in view of its statement in its motion to affirm the judgment of the district court in the *New York Central* case, 194 F. Supp. 947, that "the Commission and the Court below correctly held that reference to the anti-trust laws is appropriate in determining whether a practice is 'unfair or destructive' to competition" (motion to affirm, page 9, in No. 482, October term, 1961, *The New York Central Railroad Company* v. *United States, et al.*

**The Commission Did Not Predicate Its Order on Any Substantive Provision of Law.**

Both groups of appellees argue that Section 216(*e*) of the Interstate Commerce Act, 49 U.S.C. Section 316(e), requires that the joint rates be just and reasonable. However, neither group asserts that the Commission predicated its order on said section. The Commission did not refer in its report to any substantive provision, nor could it have done so, for all of its findings relate to remotely possible "destructive competitive practices" that might be engaged in by other railroads.

The Government emphasizes that it is the Commission's "task" to maintain "the relationship of the proposed rate to other rates and the avoidance of serious disparity" (motion, page 5). But there is no disparity between the proposed rate and other rates, nor did the

Commission find that there is. Significantly, *State of New York* v. *United States*, 331 U.S. 284, cited by the Government, did not involve "destructive competitive practices" under the National Transportation Policy, and the Commission in its report therein made findings under, and referred to, the substantive provisions found to have been violated. In *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S. 194, also cited by the Government, it merely was held that savings in costs are not the only criteria for judging the lawfulness of a proposed volume rate, and that the Commission had erroneously failed to consider the National Transportation Policy and had inadequately explained the basis of its action.

**The Commission's Report and Order Prohibit Joint Motor-Rail Rates on Coal Traffic.**

The captioned proposition is inherent in the Commission's findings that "the divisions to the motor carriers of such joint rates would reduce the revenues of the railroads" and that "if the railroads were forced by competition to enter into joint motor-rail rates, . . . the results could be . . . serious disturbance of a just and reasonable rate structure, in contravention of the National Transportation Policy" (J.S. 16a, 17a). Section 217(a) of the Interstate Commerce Act, 49 U.S.C. Section 317(a), expressly requires the publication of joint rates when through routes are established with a railroad. Therefore, motor carriers are also prohibited from entering into proportional rates on coal traffic handled by railroads and, further, are prohibited by the Commission's order from joint participation in such transportation. The Commission's failure to prescribe what it might consider a lawful rate irrebuttably supports this conclusion.

**The Commission Is Required to Make Findings under Section 15a(3).**

The Government relies on the conclusion of the court below that the requirement of Section 15a(3) of the Interstate Commerce Act is inapplicable where a railroad, under a proposed joint rate with a motor carrier, "is seeking to provide additional services than are provided by other railroads, though at the same rate". Significantly, the Commission did not make the finding, attributed to it by the lower court, that appellant C&EI is seeking to provide additional services. The Commission made the general finding that the cross-hauling of coal by motor carriers to facilities of competing rail lines would entail additional services (J.S. 16a). The Commission could not find that appellant C&EI would be performing additional services under the proposed rate, because the services are the same as, or less than, those performed under the all-rail rate, and part of the services are performed by appellant Lemmons, for which he receives payment from the mine operator in the form of a division of revenues from the proposed rate.

The two cases[4] referred to by the court below do not stand for the proposition for which they were cited; they are authority for the proposition that motor-rail service and all-rail service are separate and distinct modes of transportation. In both cases, the Commission's orders were set aside for failure to observe the requirements of Section 15a(3), for applying the "destructive competitive practices" provision of the National Transportation Policy without regard to the substantive provisions of law which

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[4] **New York, New Haven and Hartford Railroad Company v. United States, 199 F. Supp. 635 (D. Conn., 1961); Missouri Pacific Railroad Company v. United States, 203 F. Supp. 629 (E.D. Mo., 1962).**

that policy merely qualifies, and for failing to consider under the National Transportation Policy the "inherent advantages" of the trailer-on-flat-car mode of transportation.

The Government and the court below ignore the fact that the proposed rate was published under the Motor Carrier Act, which authorizes joint motor-rail rates, and not under Part I of the Interstate Commerce Act, which provides for the regulation of railroads only. The Commission itself has held that "motor-rail-motor service differs substantially from all-rail service" even though the haul that a motor carrier might receive "would be short, or terminal in character." *Motor-Rail-Motor Traffic in the East and Midwest,* 219 ICC 245, 271, 273. Since the length of the motor-haul under the proposed rate is 16 miles, and is not terminal in character, it is difficult to perceive how appellants' proposed motor-rail service can be considered an all-rail service, resulting in an "intramodal competitive situation". Certainly there is nothing in the Commission's report that indicates such a rationalization.

Appellee railroads argue that the C&EI cannot be a railroad subject to the Interstate Commerce Act and simultaneously be another mode of transportation (motion, page 12). That the C&EI can be a component of two modes, depending upon the services performed, is quite obvious and has been established beyond any doubt. *New York, New Haven and Hartford Railroad Company* v. *United States,* 199 F. Supp. 635 (D. Conn., 1961).

**The Commission Unlawfully Restricted the Application and Scope of the Second Proviso to Section 206(a) (1).**

The Government remains silent on this point while appellee railroads assert that appellant Lemmons received the same treatment as any carrier possessing his operating authority regardless of how obtained (Motion, page 13). Lemmons has been deprived of the right to enter into a joint motor-rail rate on coal transported interstate over routes within the State of Indiana because the Commission feels that railroads should not be "forced by competition to enter into joint motor-rail rates" on coal (J.S. 16a). The fact that any other motor carrier would receive the same cavalier treatment as did appellant Lemmons does not justify the Commission's action.

Appellee railroads also advance the proposition, *not found* by the Commission in its report, and contrary to the evidence, that the all-rail route is more efficient than the proposed motor-rail route (motion, page 13). If such is the case, the mine operator will not use the proposed service, since the motor-rail rate is identical to the all-rail rate; *ergo,* railroads cannot possibly "be forced by competition to enter into joint rail rates", and the structure of the Commission's *rationale,* such as it is, collapses.

**The Commission Cannot Cancel a Joint Motor-Rail without Prescribing the Lawful Rate or Lawful Minimum Rate.**

Appellee railroads rely on conclusion of law No. 7 of the court below, which cites four sections of the Interstate Commerce Act as authority for the proposition that the Commission need not prescribe a lawful rate or lawful minimum rate when it finds an existing motor-rail rate unlawful. The Government relies exclusively on Section 216(g) of the Act. One of the sections of the Interstate

Commerce Act cited by the court is Section 216(e), 49 U.S.C. Section 316(e), which specifically provides that the Commission, when it finds a joint motor-rail rate unlawful, "shall prescribe" the lawful rate or lawful minimum rate. Cf. *Oil Field Haulers Association* v. *Acton*, 53 M.C.C. 507, 508.

The other sections cited by the lower court are inapplicable. Section 204(c), 49 U.S.C. Section 204(c), authorizes the Commission to issue appropriate orders to compel carriers or brokers to comply with the provisions of Part II of the Interstate Commerce Act. This section deals with the general powers and duties of the Commission, and must yield to the specific mandate of Section 216(e). In none of the reported rate cases has the Commission acted under Section 204(c). Moreover, the Commission's report and order herein did not require appellants to comply with any provision of Part II, nor did it even refer to any provision of said Part II.

Section 216(g), 49 U.S.C. § 316(g), also cited by the court and exclusively relied on by the Government, deals with the power of the Commission to suspend proposed rates for a period of 7 months, and provides that the Commission, after hearing, may make such a rate order as would be proper in a proceeding instituted after the rate had become effective. The Government says that Section 216(g) is permissive, and so it is. The Commission is permitted by Section 216(g) to issue an order with respect to a suspended rate. But in doing so, it is limited to the type of order that would be proper in a proceeding in which the rate is not suspended. The only kind of an order which the Commission may make after a rate becomes effective is the type permitted by Section 216(e), which requires the prescription of a lawful rate

or lawful minimum rate, upon a finding that the existing rate is unlawful.

Section 217(a), 49 U.S.C. Section 217(a), requires the publishing, filing and posting of tariffs in such form and manner as the Commission may prescribe, and authorizes the Commission to reject any tariff which is not consonant with Section 217 or the Commission's regulations, whereupon the tariff shall be void. The section clearly is designed to assure public dissemination of tariff information, and has nothing to do with the power to cancel rates. The Commission did not reject the tariff containing the proposed rate; if it had, there would have been no hearing and no order concerning the proposed rate. In fact, the tariff is still on file in the Commission's offices.

The Commission's failure to prescribe what it might consider a lawful rate is consonant with the tenor of the Commission's report that joint motor-rail rates on coal are prohibited.

## CONCLUSION.

The Commission's findings are so general, speculative, and illogical that Government counsel felt compelled to substitute their own findings and attribute them to the Commission. The Commission has outlawed joint-motor-rail rates on coal in the face of a Congressional policy favoring such arrangements, and it has done so on the basis of pyramided speculations. It has failed to give effect to, and to make findings under, the recently enacted and highly important Section 15a(3) and other provisions of the Interstate Commerce Act. Finally, it has, unless

its order is set aside, perpetuated a destructive competitive practice without making any findings with respect thereto. Obviously, the issues require plenary consideration by this Court.

Respectfully submitted,

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